IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

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| OMUSA, INC., | : | CIVIL ACTION |
| Plaintiff, | : | |
| | : | |
| v. | : | |
| | : | |
| MILLER BRANDING + | : | |
| COMMUNICATION, INC., | : | |
| Defendant. | : | NO. 05-4140 |

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

DAVID R. STRAWBRIDGE
UNITED STATES MAGISTRATE JUDGE September 28, 2006

This matter comes before the Court as a dispute between Plaintiff OMUSA, Inc. ("OMUSA"), a media buying agent, and Defendant Miller Branding + Communication, Inc. ("MBC"), an advertising and marketing company. In December 2003, the parties executed a Media Buying Agreement (the "Agreement") whereby OMUSA agreed to act as the media buying agent for a national marketing and advertising campaign MBC was conducting for its client, Carbolite Foods, Inc. ("Carbolite"). OMUSA purchased advertising with various media vendors in accordance with the media buying plan approved by MBC and Carbolite. Prior to the completion of the plan, however, Carbolite stopped making its payments to MBC, leaving MBC unable to pay OMUSA its fees under the Agreement. Certain of the media purchase orders placed by OMUSA could not be cancelled by the time MBC directed OMUSA to suspend the media buying plan. As a result, several media vendors with whom OMUSA placed advertising related to the Carbolite campaign made claims and obtained judgments against OMUSA for their unpaid invoices. Unfortunately for all

parties concerned, Carbolite has gone out of business, leaving it unable to pay MBC who, in turn, has been unable to pay OMUSA.

In August 2005, OMUSA filed this diversity action against MBC. Count I of its Complaint sets forth a breach of contract cause of action regarding its unpaid fees. Count II sets forth its claim for indemnification for the third-party judgments and associated legal fees incurred. In Count III, it seeks a declaration that MBC be obligated to indemnify it against any future claims asserted in connection with OMUSA's performance under the Agreement.

MBC contends that at least some of the activities for which OMUSA seeks its fees derive from media purchases that OMUSA made without having pre-billed MBC as required in the Agreement and, therefore, that the contractual fee was not due and owing. It also contends that it has no obligation to indemnify OMUSA for the losses it has sustained or may sustain in the future as a result of Carbolite's actions because: (1) the Agreement does not require it to do so; (2) it cannot be liable for debts incurred as an agent acting on behalf of a disclosed principal (Carbolite) under the applicable body of law on agency; and (3) that the losses OMUSA incurred were a result of its breach of the Agreement's provision on pre-billing.

The parties consented to magistrate judge disposition of this matter pursuant to 28 U.S.C. § 636. A non-jury trial was held on August 1, 2006, at which time the Court heard testimony from David Haislip, the principal of OMUSA, and Howard John Miller, III, the principal of MBC.[1] The parties also provided proposed findings and post-trial briefs. After consideration of the submissions

[1] These witnesses offered testimony that was largely consistent. Both testified with candor regarding the risks their companies undertook relating to the losses and claims involved in this suit. The trial revealed little disagreement as to material facts.

of the parties and the evidence presented at trial,[2] we find that OMUSA has proven by a preponderance of the evidence that it is entitled to its fees for the advertising placed on behalf of MBC relative to the Carbolite campaign and that any failure to have pre-billed MBC for these placements did not constitute a material breach discharging MBC of its contractual obligations. We also find that MBC owes a common law duty of indemnification to OMUSA by virtue of the principal-agent relationship between the two companies as reflected in the Agreement. As a result, MBC is entitled to damages for the judgments entered against it as well as the attorney's fees incurred relating to the third-party actions. It is also entitled to a declaration that MBC indemnify it for any judgments and costs incurred for any claims brought against it in the future by third-party vendors relating to its performance under the Agreement.

While we appreciate that MBC was itself an agent, of Carbolite, by virtue of its separate agreement with that entity, that status does not relieve MBC of liability with respect to its obligations to OMUSA for the work OMUSA performed under the Agreement. We are not persuaded that the fact that MBC's ultimate principal (Carbolite) was disclosed and known to OMUSA impacts our analysis here, in which we must determine the appropriate allocation of loss as between OMUSA and MBC for what was, by all accounts, an unexpected turn of events. While MBC certainly did not wish that OMUSA incur any of these losses, the contractual relationship between it and OMUSA

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[2] The parties urged the Court to refrain from ordering the transcript of the trial out of an apparent concern that this might delay resolution of this case. As the trial evidence was rather straightforward and was limited to two witnesses whose testimony (together with arguments of counsel) consumed less than a day, we complied. Given the lack of the record, we rely upon our recollection and detailed notes taken at trial to come to our judgment. We cite to Mr. Haislip's or Mr. Miller's testimony simply as "Haislip test." or "Miller test."

requires it to bear these losses, as it contracted to pay OMUSA both for the media it placed and a fee based on the extent of media it placed. The media at issue was placed with MBC's specific authorization. MBC was to be compensated for the assumption of the risk for payment for this media under the terms of its separate agreement with Carbolite. It is unfortunate for all concerned that Carbolite has not honored the terms of that separate agreement. However, as between OMUSA and MBC, it is not OMUSA that should bear that loss.

Accordingly, we make the following findings of fact and conclusions of law.

## FINDINGS OF FACT

1. OMUSA is a New Jersey corporation. (Haislip test.)
2. MBC is a Pennsylvania corporation. (Ans. ¶ 2.)
3. The amount in controversy exceeds $75,000.00.
4. At all times relevant to this dispute, OMUSA did business as a media buying agent, assisting its clients in purchasing television, print, and radio advertising. (Haislip test.)
5. At all times relevant to this dispute, MBC did business as an advertising and marketing agency, developing marketing strategies and creating advertising for various clients. (Miller test.)
6. On or about December 5, 2002, MBC entered into a written Services Agreement with Carbolite, in which it contracted to put together a national marketing and advertising campaign for Carbolite's "low carb" product line. (Ex. P-2.)
7. In exchange for the services it was to provide, MBC charged Carbolite a 15% commission on the amount of advertising placed. (Miller test.)

8. MBC, in turn, engaged OMUSA to act as its media buying agent for the Carbolite campaign. (Ex. P-1 at ¶ 1.)

9. OMUSA and MBC entered into a one-year agreement, entitled "Carbolite Foods Media Buying Agreement" (the "Agreement") on or about December 11, 2003. (Ex. P-1.)

10. The Agreement stated that OMUSA would "pre-bill" MBC for all media purchases "no less than 30 days, and no more than 45 days prior to the closing date" for insertion of the advertising in the particular venue, "allowing for [MBC] to pay the media invoice before the closing date." (Ex. P-1 at ¶ 6.)

11. OMUSA's invoices to MBC were due within 20 days of receipt. (Ex. P-1 at ¶ 9.)

12. OMUSA had the responsibility of receiving and reviewing all media invoices and making payment to the media vendors. (Ex. P-1 at ¶ 7.) However, MBC expressly agreed that "OMUSA is not required to finance the advertising of its [clients]." (Ex. P-1 at ¶ 9.)

13. OMUSA's fees for services provided under the Agreement were calculated as a percentage of the cost of the advertising that it purchased on MBC's behalf. The Agreement did not restrict the fees due to OMUSA to advertising that actually "ran" but rather provided that OMUSA's compensation for its media planning and buying services would be equal to 8% of the gross cost of the radio, print, and television advertising "purchased" by OMUSA. (Ex. P-1 at ¶ 4.)

14. In the early months of 2004, OMUSA developed a media buying plan for the Carbolite campaign consisting of various options and schedules for the placement of

advertising. (Haislip test.)

15. Using its knowledge of the media industry and drawing upon its experience, OMUSA negotiated favorable pricing for media to be placed pursuant to the Carbolite media plan. (Haislip test.)

16. OMUSA submitted the media buying plan to MBC for its, and Carbolite's, approval. (Haislip test.)

17. On April 21, 2004, Amy Hutnik, MBC's Vice President of Account Management, communicated to OMUSA that MBC and Carbolite approved the media buying plan for media placements to run in July and August 2004. (Ex. P-7; Miller test.)

18. The media buying plan that OMUSA submitted and that MBC approved on April 21, 2004 reflected that most of the deadlines by which OMUSA needed to reserve space in the various media outlets were less than 30 days away and, in some cases, as soon as the next day. (Ex. P-7A.)

19. On May 19, 2004, Ms. Hutnik communicated to OMUSA that a later, more long-range plan (with an expected total billing in excess of $7 million) was approved. (Exs. P-9, P-12; Haislip test.)

20. In accordance with the approved media buying plan, OMUSA purchased advertising from several vendors, including SFX Marketing, Inc. (Clear Channel), Newsweek, Pace Communications, Meredith Corp., Advance Magazine Publishers, Impact Media, and NWL Media. (Haislip test.)

21. On or about June 17, 2004, MBC directed OMUSA to suspend the media buying plan and to cancel as many media purchase orders as it could. (Haislip test.)

22. OMUSA made reasonable efforts to cancel purchase orders for media that had not yet run. (Haislip test.)

23. OMUSA was unable to cancel the media purchase orders it made from the vendors identified in paragraph 20, *supra*, because the closing dates had already passed and either the advertising had already been placed or the vendor refused to release OMUSA from its commitment given a fast-approaching run date. (Haislip test.)

24. As a result, advertising purchased by OMUSA for the Carbolite campaign ran in the various media venues operated by the entities listed in paragraph 20, *supra.* (Haislip test.)

25. OMUSA invoiced MBC for ads placed simultaneous with making purchase orders of the various media vendors for placement of MBC's Carbolite advertising. (Haislip test.)

26. The invoices reflected the monies OMUSA committed to place the advertising with the various third-party media vendors, as well as OMUSA's fee under the Agreement. (Haislip test.)

27. MBC has not paid all of OMUSA's invoices. Its failure to do so was not due to any failure by OMUSA to have "pre-billed" MBC or to do any "post-buy analysis" but rather was due to the fact that it was not paid by Carbolite. (Miller test.)

28. As a result of MBC's failure to pay all of OMUSA's invoices, OMUSA has not received the fees due to it for its work under the Agreement. The unpaid fee due on the advertising that was purchased by OMUSA in accordance with approved buying

plans totaled $353,885.[3] (Haislip test.)

29. As a result of MBC's failure to pay OMUSA's invoices, OMUSA also was unable to pay for advertising it ordered for the Carbolite campaign from various media vendors. (Haislip test.)

30. The following media vendors made claims against OMUSA relating to its purchases under the media buying plan, and obtained judgments in the following amounts:

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|---|---|
| SFX Marketing, Inc. (Clear Channel) | $680,000 |
| Newsweek | $102,850 |
| Pace Communications | $12,516.25 |
| Meredith Corp. | $73,123.52 |
| Advance Magazine Publishers | $84,337.72 |

(Haislip test.; Exs. P-29, P-30, P-31, P-32, P-34.)

31. In addition, Impact Media and NWL Media claim payment for $193,659 and $48,391, respectively, relative to placements from the Carbolite campaign, although they have deferred from filing a formal action. (Haislip test.)

32. MBC does not dispute the validity of the claims made by the third-party media vendors against OMUSA. (Miller test.)

33. OMUSA asked MBC to defend it in the first action brought against it, by SFX Marketing, Inc., but MBC declined to do so. MBC did not agree to assume the

[3] Of this amount, $267,874 represents fees due on media for which OMUSA placed purchase orders that it successfully cancelled and $86,011 represents fees due on media purchases that OMUSA could not cancel. (Haislip test.) We operate under the assumption that OMUSA's efforts to cancel purchase orders that it had been authorized to make conferred a benefit on MBC and Carbolite by minimizing its exposure to third-party media vendors.

defense of any of the actions brought against OMUSA because it did not believe it had an obligation to do so. (Ex. P-26; Haislip test.)

34. OMUSA expended approximately $35,000 in defending the third-party claims brought against it and in reducing to judgment those claims for which it believed it did not have a viable legal defense and for which it sought to avoid incurring additional defense costs. (Haislip test.)

35. In addition, OMUSA has expended $15,000 in the prosecution of this litigation. (Haislip test.)

## CONCLUSIONS OF LAW

1. This Court has subject matter jurisdiction pursuant to 28 U.S.C. § 1332, as there is diversity of citizenship between the parties and the amount in controversy exceeds $75,000 exclusive of interest and costs.

2. In accordance with the parties' contractual choice of law provision, New Jersey law applies to this dispute.

### Count I - Breach of Contract

3. Pursuant to the terms of the Agreement, which we find to be a valid contract, MBC designated OMUSA as its agent with respect to the purchasing of media for advertising relative to its Carbolite marketing campaign.

4. OMUSA purchased media from the third-party media vendors described above in the scope of its authority as MBC's media buying agent and at the direction of MBC.

5. Although OMUSA may not have pre-billed MBC in accordance with paragraph 6 of

the Agreement with respect to all of the placements with the vendors, this failure did not constitute a material breach of the Agreement.

6. MBC materially breached the Agreement by not paying OMUSA for the media OMUSA purchased in accordance with the approved media buying plan from the vendors listed above and by not paying OMUSA its fee within 20 days of OMUSA's invoice.

7. OMUSA suffered a loss of $353,885 in fees due to MBC's breach.

**Count II - Indemnification**

8. The terms of the Agreement created a principal-agent relationship between MBC and OMUSA with respect to the purchase of media for MBC's Carbolite marketing campaign.

9. A principal has a common law implied duty to indemnify its agent where the agent suffers a loss which it is unfair for the agent to bear due to the nature of the relationship with the principal, e.g., where the agent suffered the loss at the direction of the principal. *See Stephenson v. R.A. Jones & Co.*, 510 A.2d 1161, 1168 (N.J. 1986) (Stein, J., dissenting) (noting that implied right of indemnity can arise from "the equities of an ongoing relationship" and characterizing "the most common example of a special legal relationship that gives rise to an implied right of indemnification" as that of principal to agent); *Ruvolo v. United States Steel Corp.*, 336 A.2d 508, 511 (N.J. Super. Ct. Law Div. 1975) (observing that "existence of a special legal relationship sufficient to impose certain duties and a subsequent breach of those duties" permits implied indemnification and noting case that found agency

was such a relationship); *Hagen v. Koerner*, 166 A.2d 784, 787-88 (N.J. Super. Ct. App. Div. 1961) (citing treatises for proposition that law implies promise of indemnity to agent directed by principal for doing act on its behalf and where reimbursement not barred due to agent's own illegal conduct).

10. OMUSA acted within the scope of its agency when it purchased media for MBC's Carbolite campaign with MBC's authorization and consistent with the goals of the parties' Media Buying Agreement.

11. OMUSA suffered a loss when it did not receive payment for the media purchases it made.

12. OMUSA has an implied right of indemnity against MBC with respect to the following judgments that have been entered against it relative to its Carbolite media placements:

| | |
|---|---|
| SFX Marketing, Inc. (Clear Channel) | $680,000.00 |
| Newsweek | $102,850.00 |
| Pace Communications | $12,516.25 |
| Meredith Corp. | $73,123.52 |
| Advance Magazine Publishers | $84,337.72 |

We find that OMUSA's liability for these losses is secondary to that of MBC in light of the benefit OMUSA conferred on MBC, given MBC's contractual obligation with Carbolite to market that company's products.

13. OMUSA was free from active wrongdoing regarding the losses at issue in this litigation and attempted to tender the defense of the claims to MBC when it received

notice of the first suit, brought by SFX Marketing, Inc. For these reasons, OMUSA is entitled to indemnification for the $35,000 in costs it incurred in defending the claims brought against it relative to the Carbolite campaign that resulted in the judgments listed above. *See Central Motor Parts Corp. v. E.I. duPont deNemours & Co., Inc.*, 596 A.2d 759, 761 (N.J. Super. Ct. App. Div. 1991).[4]

**Count III - Declaratory Judgment**

14. MBC is required to indemnify OMUSA against any claims, demands, or suits asserted in connection with OMUSA's performance under the Media Buying Agreement, together with the costs of any suits.

An appropriate Order follows.

[4] Although Plaintiff's proposed findings submitted prior to the trial indicated that OMUSA spent approximately $50,000 in defending the third-party actions, Mr. Haislip testified at trial that approximately $35,000 was spent on those claims and that $15,000 had been spent prosecuting this action against MBC. In its complaint, Plaintiff seeks to recover the "costs of [this] suit" but does not explicitly demand its attorneys fees. We do not award counsel fees in this action. Of course, Plaintiff is free to seek taxation of its costs pursuant to F.R.C.P. 54(d)(1).

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| v. | : | |
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| MILLER BRANDING + | : | |
| COMMUNICATION, INC., | : | |
| Defendant. | : | NO. 05-4140 |

**ORDER**

AND NOW, this 28th day of September, 2006, following a bench trial and upon consideration of the evidence presented at trial, together with the parties' Proposed Findings of Fact and Conclusions of Law, and for the reasons set out in the Court's accompanying Findings of Fact and Conclusions of Law:

1. The Court hereby finds in favor of Plaintiff OMUSA, Inc. and against Defendant Miller Branding + Communication, Inc. on Plaintiff's cause of action for breach of contract and finds that Plaintiff sustained $353,885.00 in damages;

2.The Court hereby finds in favor of Plaintiff OMUSA, Inc. and against Defendant Miller Branding + Communication, Inc. on Plaintiff's cause of action for indemnification for the judgments entered against it arising from Plaintiff's performance under its contract with Defendant ($952,827.49), as well as the costs Plaintiff incurred in the defense of those claims ($35,000.00); and

3. The Court hereby **DECLARES** that Defendant must indemnify Plaintiff against any claims, demands, or suits asserted in connection with OMUSA's performance under

the Media Buying Agreement, together with the costs of any suits, with respect to any claims not reduced to judgment as of the date of this Order.

It is therefore **ORDERED** that **JUDGMENT** be entered in favor of OMUSA, Inc. and against Miller Branding + Communication, Inc. in the amount of $1,341,712.49.

The Clerk is directed to close this matter for statistical purposes.

BY THE COURT:

/s/ David R. Strawbridge
DAVID R. STRAWBRIDGE
UNITED STATES MAGISTRATE JUDGE